

From: Donald R McCarty
To: 'microsoft.atr(a)usdoj.gov'
Date: 1/25/02 8:20pm
Subject: Worse than nothing

The appalling inadequacy of the proposed settlement is evident even to a non-lawyer. Subsequent public analysis and discussion of the settlement in the press and other forums has widely reinforced that perception. A few points I find most disturbing are listed below:

1. The settlement encourages misbehaviour by future monopolists. Microsoft has benefited greatly from its illegal actions in terms of profit and market position, but suffers almost no real penalty under this settlement. There is evidently great profit to be made in forming and maintaining an illegal monopoly even if one is eventually convicted. Even if we suppose the strictures of the present settlement are sufficient to restrain future misconduct of MS (and they clearly are not sufficient), MS remains far better off and continues to profit greatly from having taken its illegal course of actions against competitors. So why wouldn't they or any future monopolist embark on a similar course today given the opportunity? The evident answer is that they would be foolish not to.
2. The language and definitions in the settlement are carefully parsed and sufficiently ambiguous as to impose no real restrictions on MS. MS is a past master at negotiating this kind of document. Software is sufficiently maleable that it easily be shaped and concealed within this shell game of definitions. Hence effective enforcement will be difficult or impossible. This has the effect of immunizing MS from future litigation - in effect rewarding their past illegal behaviour. How many times must the courts be flaunted by the contemptuous "ham sandwich" defense before this lesson is learned? I believe the public would be better served by having no settlement.
3. The repeated invocation of the 9/11 national emergency by the presiding judge as cause for haste in reaching a settlement defies all logic. The dire consequences of failing to adequately restrain an illegal monopolist can only be magnified in a national emergency - especially as MS illegal actions affect innovation in the critical tech sector. The judge's statements are widely perceived as having contributed directly to the climate that produced this very weak and therefore very dangerous settlement.